



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1994

Ms. Martha C. Wright
Wright & Associates
P.O. Box 531777
Grand Prairie, Texas 75053-1777

OR94-734

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28548.

The Grand Prairie Independent School District (the "school district"), which you represent, has received a request for information relating to "allegations pertaining to investigation surrounding Dr. Marvin Crawford [the school district's superintendent]." You have submitted the requested information to us for review (Exhibit "B") and claim that the school district may withhold it from required public disclosure.

First, we address your claim that the school district may withhold the requested information because it "relates directly to personnel, is information in a personnel file, the disclosure [of which] would constitute an unwarranted invasion of personal privacy." Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).¹ See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex.

¹Section 552.102(b) protects from required public disclosure transcripts from institutions of higher education in the personnel files of professional public school employees. Section 552.102(b) expressly excludes from this protection information on a transcript detailing the degree obtained and the curriculum pursued. See Open Records Decision No. 526 (1989). The requested information does not include transcripts.

App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information must be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications and performance of public employees. See Open Records Decision No. 470 (1987) at 5. In the past, this office has concluded that the doctrine of common-law privacy does not protect an employee's reasons for leaving or an employee's job performance or ability. See also Open Records Decision No. 169 (1977). See generally Open Records Decision No. 455 (1987) at 8.

The document submitted to us for review (Exhibit "B") includes a list of allegations directed towards the school superintendent and notice of the school district's intention to conduct an investigation into the allegations. Such information is of legitimate public concern and may not be withheld under section 552.102(a) of the Government Code.

You also claim that the requested information "was developed in anticipation of litigation and is therefore not discoverable under the Texas Open Records Act." We assume that in so claiming you mean to assert section 552.103(a) of the Government Code. Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5; 511 (1988) at 3. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, see Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, see Open Records Decision No. 555 (1990).

You are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the Open Records Act. *See* Attorney General Opinion JM-672 (1987). You do not explain why litigation in this instance is pending or reasonably anticipated, nor do you explain how the requested information relates to such litigation. Accordingly, the school district may not withhold the requested information under section 552.103(a) of the Government Code.

Finally, you assert that "[a]ll of the information is subject to the Attorney Client Privilege and is therefore not discoverable under the Texas Open Records Act." Section 552.107(1) of the Government Code excepts information from disclosure if:


(1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. *See* Open Records Decision No. 574 (1990).

We have examined the document submitted to us for review. The document is a letter from the president of the school board of trustees to the superintendent. No attorney-client relationship exists between these two persons. Consequently, the document reveals no client confidences to an attorney or an attorney's legal advice. The school district may not withhold the requested information under section 552.107(1) of the Government Code. The school district must promptly release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 28548

Enclosures: Submitted documents

cc: Mr. Herb Booth
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